

Exhibit 305

United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al.
v. Dey, Inc., et al., Civil Action No. 05-11084-PBS

**Exhibit to the August 28, 2009 Declaration of Sarah L. Reid in Support
of Dey's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 -----X

4 IN RE PHARMACEUTICAL INDUSTRY)

5 AVERAGE WHOLESALE PRICE LITIGATION)

6 -----X Volume 1

7 THIS DOCUMENT RELATES TO:) MDL NO. 1456

8 The City of New York, et al.,) Civil Action

9 V.) No. 01-12257-PBS

10 Abbott Laboratories, et al.)

11 -----X

12 THIS DOCUMENT RELATES TO:)

13 State of California, ex rel.)

14 Ven-A-Care v. Abbott Laboratories,))

15 Inc., et al., Case No.)

16 03-cv-11226-PBS)

17 -----X

18 JULY 10, 2008

19 DEPOSITION OF DEY, L.P. AND DEY, INC.

20 BY PAMELA MARRS - VOLUME II

21
22 Reported By: WENDY L. VAN MEERBEKE, CSR No. 3676

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1 the code of conduct from the company's official
2 file is in the process of being produced. It
3 hasn't been produced yet. Whether or not the
4 code of conduct was part of an individual
5 employee's files that researched or another area,
6 that is possible that it's in the production. I
7 just can't point you to where that would be.

8 MR. AZORSKY:

9 Q. And you made repeated reference to
10 written procedures relating to copy clearance at
11 Dey. I'm wondering whether you had an
12 opportunity to take a look or gather any further
13 information with respect to such written
14 procedures relating to copy clearance.

15 A. No. I didn't realize I was to be
16 prepared on that today.

17 MS. GIULIANA: Right. Also, Gary, I
18 don't want to get on your record too much. The
19 things that you're referring to now are based on
20 a request that you had made to me by e-mail last
21 Wednesday, and I think I informed you that I
22 wished that you had given me a little bit more of

1 a heads-up so that I could look into those
2 matters first to determine whether or not it was
3 within the scope of your topics and then second
4 to, you know -- in the event that it was within
5 the scope, to actually make the effort to find
6 the information and either prepare Pam or produce
7 it.

8 Because you got the request to me very
9 late, I wasn't able to look into those things, so
10 I can't make a representation -- I can tell you
11 that we didn't look for those things, but what I
12 can't tell you is whether I agree that those
13 things are even within the scope of the notice
14 and that we would ever agree to that.

15 MR. AZORSKY:

16 Q. And as I responded to your e-mail to
17 me, my e-mail to you of last week was simply
18 intended to be a reminder of issues that arose at
19 the May deposition and that were a part of the
20 record at that deposition. So it was -- it was
21 not at least considered from plaintiffs'
22 perspective to be a last-minute request, but

1 that it exists because our customers use it, and
2 in some cases where our reimbursement rates have
3 been lower than others, we've lost business.

4 We as a company are aware of it in that
5 general context. I have never seen a list that
6 lists all of our products and compares and shows
7 the spread. I have not seen that document.

8 MR. AZORSKY:

9 Q. So you're saying that in -- in one
10 context or another through marketing and
11 competition with respect to Dey's generic drugs,
12 there -- there is a reference to spread and
13 looking at spread during the natural course of
14 engaging in business with respect to those
15 generic drugs?

16 A. I know that customers --

17 MS. GIULIANA: Object to form.

18 THE WITNESS: I know that customers
19 bring it up. I know that it's, you know, a fact
20 of life in the business world. I'm not aware of
21 a conscious, you know, routine decision that
22 where, you know, people were looking at the

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1 Jerry Crank and Russ Johnston that spread was not
2 discussed frequently at Dey; is that correct?

3 A. Well, in preparing for the last
4 deposition, those were two of the people -- and
5 Gary Stone. I think we talked to Gary Stone.
6 Just, again -- and we had asked different people
7 these questions before at different points in
8 time in the litigation. You know, Russ Johnston
9 was in inside sales during his early years with
10 the company. He does not recall it coming up in
11 his role as an inside salesperson.

12 So that's really all I have to go on,
13 is some selective conversations with Dey
14 salespeople based in Napa.

15 Q. You said you also spoke with Gary
16 Stone. What did Gary Stone say with respect to
17 the frequency of discussions of spread at Dey?

18 A. Again, he -- he didn't recall that the
19 spread was something that came up frequently in
20 conversations. I mean, the biggest place where
21 it probably shows up in -- in the documents is --
22 you know, you'll see a bid price worksheet where

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1 a customer raises the issue. We've certainly had
2 customers raise the issues in the context of
3 contracting as well as in seeking to have us
4 lower our price to them.

5 Q. I'd like to focus on the sources of
6 your understanding that spread was not discussed
7 frequently at Dey. And you indicated that the
8 sources of that information are Jerry Crank, Russ
9 Johnston, Gary Stone. Anyone else?

10 A. Those are the people I spoke with last
11 month or the month before last. In prior years -
12 - and Todd Galles. I'm sure I probably talked to
13 Charles Rice and Bob Mozak at one point -- at
14 some point in previous years, but I don't recall
15 the specific time periods.

16 The information that I was getting from
17 internal people was that it wasn't something that
18 was a pervasive practice.

19 Q. Okay. In addition to Mr. Crank, Mr.
20 Johnston, Mr. Stone, Mr. Galles, Mr. Rice and Mr.
21 Mozak, what other internal people gave you that
22 impression?

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1 THE WITNESS: I'm saying that as a
2 practical matter, the system -- I mean, there's
3 all kinds of testimony and documentation that
4 this is a flawed system. I'm sure that that's --
5 you know, those documents you've seen.

6 What I'm saying is that the way the
7 system was set up, it really didn't allow for
8 that. And our position has always been, fine,
9 lower AWP, but do it for every one. Treat
10 everyone the same, because otherwise, the
11 companies that -- if you lowered AWP for one
12 company and not the other who's selling the same
13 generic drug, then -- then the pharmacists won't
14 buy your drug.

15 So the system is what really needs to
16 be fixed. There have been recent actions to try
17 to take care of that.

18 MR. AZORSKY:

19 Q. So Dey could have lowered its AWP when
20 prices decreased, but did not do so due to
21 competitive pressures because competitors' AWPs
22 remained high; is that correct?

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1 MS. GIULIANA: Objection to form.

2 THE WITNESS: Dey would not have had
3 any sales if it had lowered its AWP's
4 substantially below the competitors' AWP's.

5 MR. AZORSKY:

6 Q. So in order to maintain sales, Dey kept
7 its AWP's at or about where it was initially set
8 and did not lower them as prices decreased;
9 correct?

10 MS. GIULIANA: Objection to form.

11 THE WITNESS: It's really not an issue
12 of maintaining. It's an issue of whether or not
13 you'd have any sales. And just to add to that --
14 and this is in my previous testimony, too. We
15 did have a product that we tried to launch and it
16 was in the middle of when people were trying to
17 figure out what all this litigation was about.
18 It was a nasal spray product. We launched. We
19 set a very low WAC and AWP, much lower than our
20 competitors, and we had to discontinue the
21 product. No one would buy it.

22 So it pretty much put us out of

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1 business on that product.

2 MR. AZORSKY:

3 Q. In that situation, did Dey consider
4 raising its AWP and WAC in order to get more
5 sales for that product?

6 A. No, because we were under the
7 impression that that was inappropriate at that
8 time based on the information obtained throughout
9 the litigation process.

10 Q. Well, at that time, did Dey then lower
11 its AWPs and WACs for all of its generic
12 products?

13 MS. GIULIANA: Objection to the form.

14 THE WITNESS: As I said, it's
15 impractical to expect one manufacturer to lower
16 its AWPs significantly below other similar
17 products because there would be no sales and the
18 company would go out of business.

19 MR. AZORSKY:

20 Q. Well, Mr. Upp, the national accounts
21 manager in Dey's sales department, said that when
22 these situations arose when a customer would

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1 Wells. I actually thought there was a memo or
2 something to him that I've seen at some point in
3 the past. Maybe not. I -- I was not aware of
4 that specific conversation that I recall, but I
5 was aware of the fact that there was some attempt
6 to discuss the issue with Florida to seek
7 resolution.

8 MR. AZORSKY:

9 Q. Do you have any information that
10 contradicts Mr. Uhl's characterization of that
11 communication with Florida?

12 MS. GIULIANA: Objection to form.

13 MR. AZORSKY:

14 Q. As I've described it --

15 A. I don't recall hearing that level of
16 detail before.

17 Q. Mr. Uhl also testified that Carrie
18 Jackson spoke to Jerry Wells also and that Jerry
19 Wells informed her that he couldn't make a change
20 based upon Uhl's representations, but that the
21 pricing compendia, Red Book or Blue Book or First
22 DataBank, had to make a change. Does Dey have

1 any information to contradict that?

2 MS. GIULIANA: Objection to form.

3 THE WITNESS: Again, I don't recall
4 those specifics. I -- you know, again, I have
5 this vague recollection of seeing an internal
6 memo at one point that mentioned Jerry Wells.
7 Maybe it was Carrie Jackson, but I'd have to find
8 the document to be sure.

9 MR. AZORSKY:

10 Q. Well, does your -- does the -- is it
11 your recollection that any information in the
12 memo that you're referring to contradicts that
13 testimony?

14 MS. GIULIANA: Objection to form.

15 THE WITNESS: I don't -- I don't recall
16 what the memo said. I'm sorry. I'd have to look
17 at it again.

18 MR. AZORSKY:

19 Q. Bruce Tipton, the former director of
20 national accounts in the sales department at Dey,
21 said that all the sales and marketing heads would
22 get together to discuss pricing issues or

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1 sales management. I don't recall -- back in
2 those other -- prior to, say, 2002, sales and
3 marketing was run more independently as -- and
4 the information wasn't shared as freely
5 throughout the organization as it was in later
6 years where there was more involvement of the
7 other departments.

8 Q. Is it your understanding that at these
9 plan of action meetings that took place during
10 the period you're aware they took place that
11 there were discussions about pricing and
12 marketing of Dey's products?

13 A. Well, I'm not aware of pricing. Right
14 -- you know, most of our products in the last
15 five years are brands, and most of our reps call
16 on physicians. We have a trade force, but it's
17 only a few people. We have 200 -- about 200
18 people that call on physicians and another 40
19 that call on hospitals.

20 So those people don't really deal with
21 price. The people who call -- who would call on
22 physicians are really there to promote the

1 attributes of the product. So I've not been to
2 one of these meetings. I have not seen an
3 agenda, but I know that they're usually busy
4 putting together marketing literature to drop at
5 the physician office before these meetings.

6 I know at the national sales meeting,
7 which is a once-a-year event, they do have
8 breakout sessions for the trade people and the
9 other people who might be more involved in
10 pricing, but I don't -- I haven't been to a sales
11 meeting in a long time, so I'm not sure if
12 pricing is one of the topics they talk about or
13 not.

14 Again, that's the last five years. I'm
15 not sure what the discussions were prior to that.

16 Q. So if I understand your answer
17 correctly, you're not certain whether they
18 discuss pricing, but you -- it is your
19 understanding that they discuss marketing
20 strategies and materials at these plan of action
21 meetings described by Mr. Mozak?

22 MS. GIULIANA: Objection to form.

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1 THE WITNESS: Well, the time period I'm
2 talking about was after Bob left, so it was when
3 new management came in that I became a little
4 more aware of what some of the practices were.

5 MR. AZORSKY:

6 Q. So you don't know what was discussed at
7 the ones that he would have been testifying
8 about?

9 A. No. I --

10 MS. GIULIANA: Objection to form.

11 THE WITNESS: I don't know what was
12 discussed at those meetings. I did -- I wasn't
13 even aware of the fact they were having them,
14 quite frankly.

15 MR. AZORSKY:

16 Q. I guess then if you're not aware that
17 they had such meetings -- I guess that means you
18 haven't seen any documents memorializing what
19 took place at any such meetings?

20 MS. GIULIANA: Objection to form.

21 THE WITNESS: I don't recall seeing
22 documents. Again, the national sales meeting is

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1 MS. GIULIANA: Same objection.

2 THE WITNESS: I think what I said was
3 that it -- it was my understanding it was
4 industry practice to set AWP's for generics at a
5 percentage off of the brand and that that
6 information was generally obtained from Ed
7 Edelstein at First DataBank when his advice was
8 sought by Bob Mozak.

9 MR. HENDERSON:

10 Q. Okay. So I -- to prepare for this
11 particular topic, what did you do?

12 A. This week, nothing. Before, I do
13 recall reading a transcript of a deposition where
14 the contact with Ed Edelstein was referenced.
15 It's something that I have just generally heard
16 from the attorneys as well as Mr. Mozak in the
17 course of providing documents for this
18 litigation.

19 Other than the reference to Mr.
20 Edelstein, I don't recall a specific document
21 right now that talked about industry practice.
22 It was more just what he indicated to me.

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1 Q. Okay. So based on -- Dey's view that
2 it was industry practice to set AWP at
3 approximately -- well, let me back up.

4 Do I understand correctly that Dey
5 believes and has believed that the industry
6 practice with respect to setting AWP's for generic
7 drugs is to set the AWP at approximately ten
8 percent below the AWP of the brand product?

9 A. I don't recall if it was ten percent or
10 15 percent, but it was in that -- it was in that
11 range.

12 Q. Okay. And am I correct in
13 understanding that the basis for that belief is
14 that the phone conversation that Mr. Mozak had
15 with Ed Edelstein -- I can't remember the date --
16 sometime in the early 1990s, I believe --

17 A. I think it was before albuterol was
18 launched in '92 sometime.

19 Q. Okay. So am I correct in understanding
20 that that's the basis for Dey's belief about the
21 industry practice?

22 MS. GIULIANA: Objection. Form.

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1 THE WITNESS: That's the specific --

2 MR. HENDERSON:

3 Q. Which right now --

4 A. -- third party that I recall being
5 mentioned. Bob and other people would, of
6 course, had knowledge of what was going on in the
7 industry just from virtue of being in sales and
8 marketing, which, you know, again, I was -- I was
9 relying on Bob to relay industry practice type of
10 information to me.

11 Q. Okay. In preparation for this topic,
12 did you talk to Bob Mozak about Dey's belief
13 regarding the industry practice?

14 MS. GIULIANA: Objection. Form.

15 THE WITNESS: I didn't speak with him
16 in preparing for this recent deposition. When he
17 was still with Dey and the litigation was
18 ongoing, we spoke about it then.

19 MR. HENDERSON:

20 Q. Okay. What -- what did he tell you?

21 A. Just that that was the -- that that's
22 how AWP's were set, from a mechanical standpoint

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1 that that was the basis upon which AWP's were set
2 by Dey and generally by other companies as well.

3 Q. I see. Do you recall whether or not he
4 said that's how it's set by other companies?

5 A. Well, yeah. I -- he said, you know,
6 that's just, you know, the way the industry
7 works. I'm not saying that's a direct quote, but
8 yes.

9 Q. Okay. Other than -- is there any other
10 -- I think we probably should stop because the
11 videographer needs to change the tape.

12 A. Okay.

13 MS. GIULIANA: And also the temperature
14 seems to be rising in this room.

15 THE VIDEOGRAPHER: Going off the
16 record. The time is 2:19. This is the end of
17 tape number two, Volume II in the deposition of
18 Pamela Marrs.

19 (Recess taken.)

20 THE VIDEOGRAPHER: Back on the record.
21 The time is 2:31. This marks the beginning of
22 tape number three, Volume II in the deposition of

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1 MS. GIULIANA: Objection. Form.

2 MR. HENDERSON:

3 Q. And in fact, when First DataBank did
4 not publish the AWP that Dey had reported, Dey
5 took action to correct the situation?

6 A. Well, the way we learned of the fact
7 that they hadn't published --

8 Q. I'm not asking you how you learned.

9 A. Let me finish. Let me finish. We did
10 nothing to control that situation. We only
11 became aware of it when our customers called us
12 threatening to not purchase our product anymore
13 because they had been notified by First DataBank
14 of this price that we knew nothing about, and we
15 were faced with the situation where if we didn't
16 take some action, those customers all would have
17 gone away and the plant in Napa would have
18 closed.

19 Q. Ms. Marrs, you just said that Dey did
20 not control that situation. In fact, Dey sued
21 First DataBank to force them to publish what you
22 had reported. Didn't Dey do that?

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1 MS. GIULIANA: Objection to form.

2 THE WITNESS: We took action after our
3 customers reported to us that the numbers had
4 been changed in a manner in which was
5 inconsistent with everyone else in the industry.

6 MR. HENDERSON:

7 Q. When Dey learned that First DataBank
8 had not published the AWP that Dey reported to
9 them, Dey sued First DataBank to correct that?

10 MS. GIULIANA: Objection. Form. It's
11 asked and answered.

12 THE WITNESS: We sued First DataBank,
13 and our intention was we didn't care if our AWP
14 changed, but everyone else's needed to change and
15 there needed to be a level playing field.

16 MR. HENDERSON:

17 Q. You sued First Data -- you didn't ask
18 First DataBank to publish everybody -- to publish
19 a different AWP for everybody else. You sued
20 First DataBank to force them to publish the AWP
21 that you reported to First DataBank; isn't that
22 correct?

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1 launch. And I'd like to ask a few questions
2 about the -- Dey's belief regarding any industry
3 practice concerning changing or not changing the
4 AWP after launch.

5 A. It's my understanding --

6 MS. GIULIANA: Objection to the form.

7 THE WITNESS: It's my understanding
8 that for generics, the price is set at launch and
9 it does not change subsequently. But for brands,
10 it is set at launch and it is subsequently
11 changed, and it moves in the same direction as
12 the actual price changes in the marketplace.

13 MR. HENDERSON:

14 Q. And tell me who at Dey has had that
15 belief --

16 MS. GIULIANA: Objection to the form.

17 MR. HENDERSON:

18 Q. -- about this being an industry
19 standard.

20 MS. GIULIANA: Same objection.

21 THE WITNESS: Same answer as before, I
22 guess. You know, it's something that we've

1 consistently done. It's something that it's our
2 understanding -- and that would be a little
3 broader because it's actually the contracts
4 people who implement the price changes. So, for
5 example, if there's a WAC change on a generic,
6 they do the revised pricing and -- and reporting
7 of that, and over the years they would change the
8 WAC and not change the AWP.

9 On the same hand, if they were
10 processing a price change for a brand which would
11 traditionally be an increase to the price, then
12 they would publish both a new WAC and a new AWP.
13 And the AWP and the WAC would go up by the same
14 percentage point.

15 So the people who process those
16 transactions would be aware of them.

17 MR. HENDERSON:

18 Q. I appreciate that, Ms. Marrs. My
19 question was, who at Dey -- and if you could,
20 please identify them by name -- had this belief?

21 A. It would be primarily Russ Johnston.
22 He's the one who has been in charge of those

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1 A. I believe that's what is represented in
2 these documents in Exhibit 33. And if I could
3 just add one thing, because before when we spoke
4 about this question, we were focused on the AWP
5 piece. We didn't really talk about the WAC
6 piece, which to me is confusing because it says,
7 "WACs that were higher than actual wholesale
8 acquisition costs."

9 Well, by definition -- by Dey's
10 definition and I believe by industry definition -
11 - although I'm not 100 percent sure if everyone
12 in the industry does this. Our WAC is our
13 invoice price to the wholesaler. So from our
14 standpoint, WAC equals invoice price -- actual
15 invoice price. So to me these are saying the
16 same thing.

17 Q. Okay. Let's discuss that topic.
18 You're right. Our previous questions and your
19 testimony was -- did not cover the WAC issue.

20 You said Dey's WACs are Dey's invoice
21 prices?

22 A. To wholesalers.